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FILED

AUG 20 2003

OFFICE OF THE CLERK

No. 02-1819

In The
Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS, *et al.*,

Petitioners,

v.

BLUEBEARD'S CASTLE, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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17 pp

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INTRODUCTION

In their Brief in Opposition, Respondents[1] devote little effort to refuting the merits of Petitioners' arguments that 48 U.S.C. § 1401a: (1) does not unambiguously confer a private right of action under the standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002); and, in any event (2) has been implicitly repealed by the Revised Organic Act of 1954, as amended. Instead, Respondents primarily assert that the questions presented in the Petition are not worthy of Supreme Court attention – even in the context of a grant, vacate and remand ("GVR") order – because these questions purportedly were not addressed by the Third Circuit in its underlying decision. Respondents admit, however, that "a court would ordinarily address the question of a private right of action first[.]" Opp. 13. And they do not dispute the absence of federal subject matter jurisdiction if, as alleged, Congress implicitly repealed § 1401a. The Third Circuit thus could, and should, have resolved *sua sponte* these threshold issues before affirming a preliminary injunction entered by the District Court of the Virgin Islands ("District Court") that precluded the Government of the Virgin Islands ("Government") from collecting real property taxes.

Respondents further claim that Supreme Court review is unwarranted because the underlying decision is interlocutory. Respondents do not dispute, however, that in

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[1] Respondents captioned their brief as "*Government of the Virgin Islands, et al. v. Equivest St. Thomas, Inc.*" This case, however, was docketed in this Court and in the Third Circuit as "*Government of the Virgin Islands, et al. v. Bluebeard's Castle, Inc., et al.*" Equivest St. Thomas, Inc. is a corporation formed by the merger of the two Respondents.

appropriate circumstances "certiorari review of interlocutory orders of federal courts is available." *Ohio Citizens For Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986). Such review is necessary here because the decisions below are inconsistent with this Court's decision in *Gonzaga University* and, moreover, flout the stated will of Congress to confer on the Government substantial autonomy over local issues, such as real property taxation. In spite of this Congressional mandate – and based solely on an arcane 1936 statute, confers no private right of action, and has been implicitly repealed – the District Court has placed onerous restrictions on the Government's ability to assess real property and collect property taxes in the midst of a fiscal crisis. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (reviewing preliminary injunction because "the Court of Appeals' decision is clearly erroneous under our precedents" and "the lower court's judgment has produced immediate consequences for" the State of Montana).[2]

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[2] Respondents note that the Virgin Islands Legislature passed legislation "subsequent to the filing of the petition" that purportedly "permits the collection of taxes pending further judicial proceedings, thus resolving any alleged financial crisis arising from the granting of a permanent injunction." Opp. 10-11; Opp. App. 1a-11a. This legislation, however, is subject to the permanent injunction entered by the District Court. By order dated August 13, 2003, the District Court partially lifted the May 12, 2003, permanent injunction. Supp. App. 1-3. It remains unclear whether this order permits the Government to collect tens of millions of dollars of delinquent taxes. It is, however, clear that the tax assessor continues to be prohibited from independently assessing real property taxes in the Virgin Islands pursuant to statutory duties assigned him by the Virgin Islands Legislature.

REASONS FOR GRANTING THE PETITION

A. A GVR Is Warranted In Light Of *Gonzaga University*.

According to Respondents, the Petition should be denied because Petitioners purportedly did not raise, and the Third Circuit purportedly did not address, the private right of action issue. Respondents chiefly rely on *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), for the proposition that the private right of action issue must be preserved for appeal unlike the issue of subject matter jurisdiction. Opp. 13-14. In *National Railroad Passenger Corporation*, however, this Court found that the question of whether a "provision of law creates a cause of action whereby a private party . . . can enforce duties and obligations imposed by the [statute]" raises a "threshold question" that "overlap[s]" the jurisdiction inquiry because "it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it."[3] The requested GVR is appropriate here

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[3] *See also Consolidated Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543 (2d Cir. 1997) ("Although the district court dismissed the present complaints for lack of standing, and it was that issue that was briefed by the parties before this court, we first must consider whether the action is maintainable, that is, whether plaintiffs have stated a valid cause of action, 'for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action.' "); *Cedar-Riverside Assocs., Inc. v. City of Minneapolis*, 606 F.2d 254, 259 n.10 (8th Cir. 1979) (holding that, under *National Railroad Passenger Corporation*, court must first examine whether the statute invoked creates a private right of action); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1220 (9th Cir. 1978)

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because, as Respondents concede, the Third Circuit did not decide this "threshold question" before finding that the District Court had jurisdiction to enjoin the Government from collecting real property taxes. Opp. 11.

This Court found a GVR order appropriate under similar circumstances in *Face v. National Home Equity Mortgage Association*, ___ U.S. ___, 123 S. Ct. 69 (2002), *reh'g denied*, 154 L. Ed. 2d 557, 123 S. Ct. 651 (2002), which was remanded to the Fourth Circuit "for further consideration in light of *Gonzaga University*[.]" In *Face*, the appellants had not raised, nor had the court considered, the implied right of action issue before this Court issued its GVR order. *See Nat'l Home Equity Mortg. Ass'n v. Face*, 322 F.3d 802, 804 (4th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3791 (U.S. June 9, 2003) (No. 02-1810).[4] In fact, the petitioners in *Face* did not even directly raise the private right of action issue in their underlying

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(same); *M.B. Guran. Co. v. City of Akron*, 546 F.2d 201, 203 (6th Cir. 1976) (same); *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976) ("Issues of standing and the existence of a private right of action often overlap. As a threshold matter, we may examine the question whether a private cause of action exists in favor of a particular plaintiff. If it does not, the standing issue need not be considered.").

[4] On remand, the Fourth Circuit decided not to address *Gonzaga University* because the appellants never appealed the district court's finding that the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act"), 12 U.S.C. §§ 3801-06 conferred a private right of action. *See Face*, 322 F.3d at 804. The Fourth Circuit's approach, which Petitioners submit is flawed, has no bearing on this Court's holding that a GVR was appropriate under the circumstances of that case. Moreover, the appellants in *Face* have filed a petition for writ of *certiorari* to address the Fourth Circuit's holding. *See Face v. Nat'l Home Equity Mortg. Ass'n*, Petition for Writ of *Certiorari*, 71 U.S.L.W. 3791 (U.S. June 9, 2003) (No. 02-1810).

petition for writ of *certiorari*.[5] This Court's decision to issue a GVR order in *Face* is thus consistent with the obligation of federal courts to address – *sua sponte* if necessary[6] – the private right of action issue as a "threshold" inquiry.[7]

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[5] *See generally* Petition for Writ of *Certiorari*, *Face v. Nat'l Home Equity Mortg. Ass'n*, ___ U.S. ___, 123 S. Ct. 69 (2002) (No. 01-1827) (available at 2002 WL 32135838).

[6] *See Ross v. Hotel Employees & Restaurant Employees Int'l Union*, 266 F.3d 236, 242 (3d Cir. 2001) (addressing the private-right-of-action issue for the first time on appeal even though the plaintiff did not submit any arguments on the issue on summary judgment before the district court); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000) (holding that although the private-right-of-action issue was not raised on appeal, it was "incumbent" on the court to address it); *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 370 (6th Cir. 1981) (addressing the private-right-of-action issue *sua sponte*); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 230 (6th Cir. 1980) (same).

[7] As in *Face*, this Court may issue a GVR order here without first resolving the unsettled question of whether the private right of action inquiry implicates statutory or Constitutional subject matter jurisdiction. *Compare Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction") *with Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) ("Question of the existence of a statutory cause of action is, of course, one of statutory construction") (citation omitted) *and Nat'l R.R. Passenger Corp.*, 414 U.S. at 456 (explaining that the private right of action question "overlap[s]" with the question of "whether a federal district court has jurisdiction under the terms of the [federal statute] to entertain such a suit") *and Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1139 (3d Cir. 1995) (affirming dismissal of "federal transportation law claims for lack of subject matter jurisdiction because neither the Interstate Commerce Act nor the Elkins Act grants the plaintiffs the right to pursue their allegations in a federal court") *and TCG Detroit*, 206 F.3d at 622 (holding that whether a statute confers an implied right of action is jurisdictional "since the question of [] standing implicates the United

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Respondents argue, in the alternative, that the District Court's analysis of the private right of action issue is consistent with *Gonzaga University*, Opp. 14-15, but they have failed to demonstrate how § 1401a creates a private right of action enforceable under 42 U.S.C. § 1983 "in clear and unambiguous terms," *Gonzaga Univ.*, 536 U.S. at 290. In fact, Respondents merely parrot the District Court's opinion, which found that § 1401a confers a private right of action because that statute purportedly "was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use." Opp. 15 (quoting Pet. App. 44).[5] The District Court's analysis was rendered without the benefit of this Court's decision in *Gonzaga University*, which "resolv[ed] any ambiguity in [its] own opinions." *Gonzaga Univ.*, 536 U.S. at 282 (rejecting the notion that a plaintiff can enforce a statute under 42 U.S.C. § 1983 "so long as Congress intended that the statute 'benefit' putative plaintiffs"). The legislative history relied on by the District Court thus falls far "short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283.

States Constitution's Article III case-or-controversy requirement, which must be satisfied for a federal court to hear the case") *and Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1378 (11th Cir. 1997) (holding that under prudential limitations on standing, "[t]he "zone of interests' test compels us to examine the 'nature and source' of the plaintiff's allegations and inquire whether the Congress, in passing the MSP laws, intended to confer the right to sue upon individuals in the position of the Employer Plaintiffs").

[5] As discussed in the Petition, Congress enacted § 1401a with the principal purpose of providing the Virgin Islands with more tax revenue. *See* Pet. 5-6, 20-21.

Finally, Respondents assert that *Gonzaga University*'s holding must be limited to interpretations of "spending legislation." Opp. 16-17. The Supreme Court, however, did not so limit its holding but, instead, broadly declared that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied right of action." 536 U.S. at 290. Nor do Respondents even attempt to reconcile their limited interpretation of *Gonzaga University* with the Court's decision to issue a GVR order in *Face*, which involved an interpretation of the Parity Act promulgated under the Commerce Clause. *See Nat'l Home Equity Mortg. Ass'n v. Face*, 64 F. Supp. 2d 584, 592 (E.D. Va. 1999) ("In enacting the Parity Act, Congress exercised its plenary Commerce Clause powers."), *aff'd*, 239 F.3d 633 (4th Cir. 2001), *cert. denied*, 534 U.S. 823 (2001). As in *Face*, this Court should issue a GVR order requiring the Third Circuit to consider the "threshold" private right of action issue in light of *Gonzaga University*.

B. A GVR Is Warranted In Light Of Congress' Implicit Repeal Of § 1401a.

Respondents do not, because they cannot, dispute that the District Court lacked subject matter jurisdiction to enjoin Petitioners if, as alleged, the Revised Organic Act of 1954 repealed § 1401a. *See Bruner v. United States*, 343 U.S. 112, 116 (1952) ("'It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute *takes away the jurisdiction*.'") (quoting *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 544-45 (1867)) (emphasis added). Nor do Respondents argue that this issue can be

waived. *See United States v. Griffin*, 303 U.S. 226, 229 (1938) (holding that lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties). Instead, Respondents summarily claim that "[i]t is for the U.S. Congress to determine whether that law should be repealed." Opp. 17. This conclusory statement is unpersuasive.[9]

Respondents ignore 48 U.S.C. § 1574(c), in which Congress *did determine* to abrogate all "laws of the United States applicable to the Virgin Islands on July 22, 1954" that are inconsistent with the Revised Organic Act of 1954 and its amendments. *See* Pet. 23-26. Similarly, Respondents ignore the seminal Third Circuit case on this issue, *Virgo Corporation v. Paiewonsky*, 384 F.2d 569 (3d Cir. 1967). *Virgo Corporation* held that, in light of Congress' intent in the Revised Organic Act of 1954 to provide "a greater degree of autonomy to the people of the territory," there is no reason to believe that Congress "intended to shackle the legislature with restrictions which had been placed in 1936 upon the municipal councils as the direct successors of the old Danish colonial councils." *Id.* at 577. Here, as in *Virgo Corporation*, there is no reason to believe that Congress, after it enacted a charter of comprehensive local self-government in 1954, intended to "shackle" the Virgin Islands Legislature with restrictions originally imposed in 1936 to cure perceived defects in the remnants of a Danish colonial system. At a minimum, therefore, this Court should GVR the case to reconsider the District

[9] Notwithstanding Respondents' assertion to the contrary, *see* Opp. 12, this question was raised as the second issue presented in the Petition for Rehearing *En Banc* filed with the Third Circuit.

Court's subject matter jurisdiction under § 1401a in light of these arguments.

CONCLUSION

For the above reasons, Petitioners, the Government of the United States Virgin Islands and Roy Martin, in his official capacity as Tax Assessor, respectfully urge this Court to grant the petition for a writ of certiorari, vacate the decision of the United States Court of Appeals for the Third Circuit, and remand with instructions to dismiss the case.

Respectfully submitted,

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FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

	)	Civ. No. 2000-141
	)	Civ. No. 2000-167
In re: Tax Litigation	)	Civ. No. 2001-151
	)	Civ. No. 2001-155
	)	Civ. No. 2001-181
	)	Civ. No. 2001-196
	)	Civ. No. 2001-197
	)	Civ. No. 2001-228
	)	Civ. No. 2002-057

ORDER

The Government of the Virgin Islands has renewed its motion to stay the portion of this Court's May 12, 2003 Decree that enjoined the Government from collecting property taxes based on the unlawful assessment system presently in place. In the May 12, 2003 Decree, I suggested that the Government would be able to issue bills based on the illegal assessment values for calendar year 1998 reflected in the 1999 tax bills[1] if it provided a mechanism to adjust the assessment and bills retroactively. I indicated that this could be done by giving

[1] Although property in the Virgin Islands is assessed on a calender year basis, the assessment roll on which tax bills are issued is established as of January 15 of the following year, when the Tax Assessor determines the ownership of all properties. *See* 33 V.I.C. §§ 2301(a), 2405(a). Accordingly, the 1999 property tax bill was based on the 1998 assessment level.

credits for overpayment and issuing supplemental bills for underpayments once the Special Master has certified that the Territory's Tax assessment system as equitably and reliably assessing real property at its actual value and all property has been reassessed from calender year 1998 forward. The Virgin Islands responded to this suggestion with the passage of Act No. 6586, which provides the aforementioned relief. The Governor signed this Act into law on July 14, 2003. Therefore, as I find that the Government has acted sufficiently to provide relief for the Territory's taxpayers and believe that the Government is entitled to collect revenue from property taxes, I shall modify the May 12, 2003 injunction in regard to all non-plaintiff taxpayers to allow the Government to issue tax bills based on the 1998 assessments reflected in the 1999 tax bills. The injunction shall remain unmodified and in full effect for all parties to this litigation.

Accordingly, it is hereby

ORDERED that the portion of the May 12, 2003 injunction prohibiting the Government from collecting property taxes based on the 1998 assessment reflected in the 1999 tax bills is **LIFTED** in regard to all non-plaintiff taxpayers only, and that it remains in full effect regarding all plaintiffs in this litigation.

ENTERED this 13th day of August, 2003.

For the Court

/s/ Thomas K. Moore
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: Frank Blackman
Deputy Clerk

cc: Hon. R.L. Finch [8/13/03 /s/ FB]
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